

Recycle Track Sys., Inc. v MDRN Group, LLC

2020 NY Slip Op 32582(U)

August 5, 2020

Supreme Court, New York County

Docket Number: 650660/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

RECYCLE TRACK SYSTEMS, INC.,

Plaintiff,

- v -

MDRN GROUP, LLC,
MDRN GROUP TWO, INC.,
STOOP SOCIAL, LLC and
ZACHARY A. EHRLICH,

Defendants.

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INDEX NO. 650660/2020

MOTION DATE 02/27/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for

JUDGMENT - DEFAULT

Upon the foregoing documents, the motion of plaintiff Recycle Track Systems, Inc. for entry of a default judgment is granted as against defendant MDRN Group, LLC, and Zachary A. Ehrlich, and denied as to the remaining defendants, in accord with the following memorandum decision.

Background

Plaintiff Recycle Track Systems, Inc. (“Plaintiff”) is the assignee of a sublease to the premises located on the entire 9th floor of 443 Park Avenue South, New York, New York (the “Premises”). By agreement dated January 23, 2015, non-parties 443 Company, as landlord, and Recycle Rewards, Inc., as tenant, entered into a lease (the “Underlying Lease”) (Curcuru aff, exhibit 1). By a subsequent agreement dated January 12, 2018 (the “Sublease”), non-party RecycleRewards PBC (“RecycleRewards”), as sublessor and successor-in-interest to Recycle

Rewards, Inc., entered into a sublease agreement for the Premises with defendant MDRN Group, LLC (“MDRN Group”), as subtenant (Curcuro aff, exhibit 2). Paragraph 3.01 of the Sublease provides that the “Sublease is in all respects subject and subordinate to the terms and conditions of the Underlying Lease” (*id.*). In connection with the Sublease, Defendant Zachary A. Ehrlich (“Ehrlich”) signed a “Form of Guaranty” dated January 18, 2018 (the “Guaranty”) whereby he agreed to guarantee the full and faithful performance by MDRN Group, its successors or assigns, of all the obligations of MDRN Group under the Sublease, including but not limited to payment of rent and all other charges required to be paid by the MDRN Group under the Sublease (*id.* at 15-18). Effective October 18, 2019, non-party RTS RecycleBank LLC (“RecycleBank”) acquired substantially all of the assets of RecycleRewards, and RecycleRewards entered into a written assignment of the Underlying Lease and Sublease to RecycleBank (Curcuro aff ¶ 11). Effective January 28, 2020, RecycleBank assigned all of its rights under the Sublease to Plaintiff (*id.* ¶ 19). Defendant MDRN Group Two, Inc. (“Group Two”), is a New York corporation that, as plaintiff alleges upon information and belief, also operated at and benefitted from the Premises, and is an alter ego of MDRN Group. Defendant Stoop Social, LLC (“Stoop Social”), is a Delaware limited liability company that was listed on the lobby directory as being located at the Premises and received mail at that address.

On January 29, 2020, Plaintiff commenced this action by filing a summons and complaint, which asserts claims for breach of the Sublease agreement and breach of the Guaranty arising from MDRN Group’s ongoing failure to pay rent beginning in September 2019. By this motion, Plaintiff moves for entry of a default judgment against all defendants (together, “Defendants”) for their failure to answer the complaint or otherwise appear. The motion is unopposed.

Discussion

A plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215[a], [f]). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, Plaintiff has submitted proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defendants' default in answering or appearing (*Allstate Ins. Co. v Austin*, 48 AD3d 720, 720 [2d Dept 2008]). As against MDRN Group, Plaintiff's proof, which includes the Underlying Lease, Sublease, Guaranty Agreement, and the assignments of the Underlying Lease and Sublease to RecycleBank and then to plaintiff, as well as the affidavit of Curcuro, establishes, *prima facie*, a breach of contract cause of action by showing: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Pampillonia v Montague Urgent Med. Care, PC*, 2020 WL 836793 [Sup Ct, NY County Feb. 7, 2020, index No. 650773/2019]). Plaintiff has also made the necessary showing as against Ehrlich. "Where a guaranty is clear and unambiguous on its

face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement” (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446-447 [1st Dept 2012], quoting *National Westminster Bank USA v Sardi's Inc.*, 174 AD2d 470, 471 [1st Dept 1991]). In this instance, the Guaranty is clear, unambiguous, absolute and unconditional and, having defaulted in this action, Ehrlich has not shown, or even alleged, any fraud, duress or any other wrongful conduct by plaintiff with respect to the agreement.

Plaintiff has, however, failed to meet its burden with respect to liability against the remaining defendants. Plaintiff has not demonstrated that Group Two and Stoop Social were parties to the Sublease or Guaranty, or are otherwise liable for either cause of action asserted in the complaint. The extent of Plaintiff’s information offered against Group Two is a single allegation, offered on information and belief, that it operated at and benefitted from the Premises, and otherwise is an alter ego of Subtenant (Curcuru aff ¶ 4). With respect to Stoop Social, Plaintiff alleges only that it “was listed on the lobby directory” and “received mail” at the Premises (*id.* ¶ 5). These allegations alone are insufficient to warrant the entry of a judgment against these parties. Therefore, the motion for a default judgment is denied as to these parties.

With respect to damages, Plaintiff has demonstrated its entitlement to an award of damages as provided for by the Underlying Lease and Sublease, including an award of reasonable attorneys’ fees as provided for by section 4.02 of the Sublease. Plaintiff has submitted sufficient proof of the following itemized damages: (1) rent for the months of September through December 2019 and January 2020 in the amount of \$140,593.38, (2) late charges for the five-month period at the rate of \$.02 for each dollar overdue for each month, or fraction of each month, from its due date until paid for a total charge of \$11,225.07, (3) forfeited Free Rent in the

amount of \$54,915.00, (4) \$360 in damages and porter overtime expended as the result of damage to a fire alarm pull station, and (5) interest at the rate of 6%, as provided for in the Underlying Lease. Plaintiff also seeks to recover unstated amounts for removal of furniture and trash left at the Premises and reasonable attorneys' fees. Whereas Plaintiff has demonstrated liability for these items, but not quantified its damages, they will be set down for an inquest.

Accordingly, it is

ORDERED that plaintiff Recycle Track Systems, Inc.'s motion for leave to enter a default judgment pursuant to CPLR 3215 is granted as against defendants MDRN Group, LLC and Zachary A. Ehrlich, and denied as to MDRN Group, Two, Inc. and Stoop Social, LLC; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Recycle Track Systems, Inc. and against defendants MDRN Group, LLC and Zachary A. Ehrlich, jointly and severally, in the amount of \$207,093.46, with interest at the rate of 6% per annum from the date of September 1, 2019, as calculated by the Clerk; and it is further

ORDERED that the sum of reasonable attorneys' fees, costs and other amounts expended by Plaintiff for enforcement of the Underlying Lease and Sublease, as set forth herein, shall be set down for an inquest to determine the appropriate amount due, and Plaintiff shall file a Note of Issue, pay the appropriate fees, and the action shall be placed on the calendar for such assessment; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Louis L. Nock

8/5/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE